from the operator or its affiliates.[260]

118. In response, NATOA argues that excluding the open video system operator affiliate's revenues from the gross revenues fee calculation would defeat the entire purpose of the fee, and would permit an open video system operator to pay far less than a cable operator by the simple expedient of creating a corporate subsidiary.[261] Similarly, Michigan Cities, et al. argue that excluding the affiliate's revenues would thwart Congress' goal of ensuring equal treatment among video providers, and would permit an operator to engage in a corporate "shell game" in which the operator provided essentially no services and had all revenue-generating activities provided by its affiliates.[262] In addition, NCTA argues that the Telephone Joint Petitioners' proposal to exclude carriage revenues from the fee calculation "is simply beyond the pale, as it would allow LECs to avoid paying any gross revenue fee by the simple expedient of providing "cable" service through an affiliate.[263] Conversely, NCTA and the Alliance for Community Media, et al. argue that NYNEX's proposal to include only those revenues derived from carriage in the fee calculation would understate the revenues derived from open video service,[264] ignores the significance of the statute's use of the term "cable service" instead of carriage, and would create a fee that is not nearly equivalent to the franchise fee imposed on cable operators.[265]

2. Discussion

119. We generally reaffirm our conclusions in the *Second Report and Order*. We continue to believe that our interpretation represents the best reading of Section 653(c)(2)(B). We will, however, clarify our rule to make clear our intent that local governments have the authority to charge and receive the gross revenue fee. In addition, consistent with Congress' intent of ensuring "parity among video providers,"[266] we will clarify that any advertising revenues received by an open video system operator or its affiliates in connection with the provision of video programming should be included in the fee calculation, where such revenues are included in the incumbent cable operator's franchise fee calculation.

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[260]U S West Petition at 8.

[261]NATOA Opposition at 3-5 (arguing that an open video system operator's carriage and other non-subscriber revenues that would not exist "but for" the operator's provision of video services must also be included in the fee calculation).

[262]Michigan Cities, et al. Opposition at 5-6.

[263]*See* NCTA Opposition at 6 (emphasis in original).

[264]*Id.*

[265]Alliance for Community Media, et al. Opposition at 6.

[266]Conference Report at 178.

120. Those petitioners seeking to include the gross revenues of unaffiliated programming providers in the fee calculation have largely repeated arguments made by the National League of Cities, et al. earlier.[267] In our view, those arguments fail to account for the clear statutory language that the gross revenues fee applies to the open video system operator's revenues relating to its provision of cable service.[268] We also disagree with these petitioners that our formulation necessarily will result in lost revenues to local governments. Petitioners assume that an entity would build the same system, whether it was going to provide cable service or open video service. This may not be accurate. For example, an open video system operator may have additional incentives to build a large capacity system in order to be assured of a sufficient number of channels to compete head-to-head with the incumbent cable operator. Similarly, whether the fee that a local government receives is greater or lesser than the incumbent cable operator pays will vary depending upon the relative channel capacity of the systems, the amount of channel capacity occupied by the open video system operator, and the carriage rates the operator is able to negotiate with unaffiliated providers.[269]

121. On the other hand, we do not agree with the Telephone Joint Petitioners and NYNEX that the revenues of an open video system operator's affiliates should be excluded from the calculation of the gross revenue fee. Section 653(c)(2)(B) applies to gross revenues attributable to an open video system operator's "provision of cable service." Under the Communications Act, "cable service" is defined as "the one-way transmission to subscribers of (i) video programming, or (ii) other programming service . . . "[270] Thus, to the extent that an open video system operator employs an affiliate to provide video programming to subscribers, the revenues that its affiliate receives from subscribers are subject to the gross revenues fee.[271] To hold otherwise would place form over substance and would create a disparity between open video system operators that use affiliates to provide video programming and those that provide programming themselves. The Telephone Joint Petitioner's proposal to exclude carriage revenues from the fee calculation would widen this potential difference. There is no indication in Section

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[267]*See, e.g.,* National League of Cities, et al. Comments (filed April 1, 1996) at 45-46, and Reply Comments (filed April 11, 1996) at 38-39. We address the Fifth Amendment argument raised by the National League of Cities, et al. and NATOA in Section III.F.5., below.

[268]Communications Act § 653(c)(2)(B), 47 U.S.C. § 573(c)(2)(B).

[269]In addition, we find no ground for Dade County's belief that any difference in the total fees assessed on an incumbent cable operator and a competing open video system would entitle the cable operator to be released from its franchise agreement. The gross revenues fee provision is part of Congress' overall open video framework. The fact that, in relation to cable, Congress' open video framework imposes certain obligations and provides certain benefits, does not constitute actionable "discrimination." Dade County Petition at 3.

[270]Communications Act § 602(6), 47 U.S.C. § 522(6).

[271]On similar grounds, we reject NYNEX's proposal to apply the gross revenues fee only to carriage revenues received by the open video system operator, whether from affiliated or unaffiliated programming providers. *See* NYNEX Petition at 3-9.

653(c)(2)(B) that Congress intended to limit "gross revenues of the operator" to those revenues derived solely from the sale of its own programming. Indeed, the Telephone Joint Petitioner's proposal could result in an open video system operator that provided its programming through an affiliate paying little or no fee, contrary to Congress' intent "to ensure parity among video providers."[272]

122. Finally, we agree with NYNEX and U S West that the application of the gross revenues fee provision should not disadvantage any particular video programming provider. Like the costs of PEG and must-carry, we believe that the gross revenues fee is a cost of the platform -- in this case, the cost of using the rights-of-way -- that should be shared equitably among all users of the system. We therefore will permit open video system operators to recover the gross revenues fee from all video programming providers on a proportional basis as an element of the carriage rate.

F. Applicability of Title VI Provisions

1. Public, Educational and Governmental Access Channels

a. Establishing Open Video System PEG Access Obligations

(1) Background

123. In the *Second Report and Order*, the Commission found that open video system operators should in the first instance be permitted to negotiate their PEG access obligations with the relevant local franchising authority and, if the parties so desire, the local cable operator.[273] We also provided a default mechanism in case an agreement cannot be reached, whereby the open video system operator will be required to satisfy the same PEG access obligations as the local cable operator.[274] We stated that this could be accomplished through connection to the local cable operator's PEG access channel feeds and by sharing the costs directly related to supporting PEG access, including the costs of PEG equipment and facilities, and equipment necessary to achieve the connection.[275]

124. Alliance for Community Media, et al. state that the Commission must require the open video system operator to add PEG resources to those provided by the existing cable operator as opposed to cutting those resources in half and forcing entities providing PEG access to perform

[272]Conference Report at 178.

[273]*Second Report and Order* at para. 137.

[274]*Id.* at para. 141.

[275]*Id.*

more services on existing budgets.[276] National League of Cities, et al. claim that because a cable operator's PEG access obligations are established by franchise agreement, the Commission may not reduce them.[277] Furthermore, according to National League of Cities, et al., the Commission mistakenly assumes that a community has obtained all the PEG support it needs from the cable operator.[278] National League of Cities, et al. claim that the local franchising authority has the right to obtain additional compensation in the form of PEG from the open video system operator.[279]

125. Telephone Joint Petitioners assert that the Commission's approach may remove a local franchising authority's incentive to negotiate PEG access obligations that do not match or exceed those of the incumbent cable operator. In addition, Telephone Joint Petitioners claim that the Commission's approach may give local franchising authorities the power to demand other obligations from open video system operators.[280] According to Telephone Joint Petitioners, if no agreement with the local franchising authority can be reached, an open video system operator should be permitted a third option of demonstrating (either in a complaint proceeding before the Commission or in arbitration) that it is not possible to satisfy the local franchising authority's demands or to duplicate exactly the PEG access obligations of the cable operator, or that the open video system operator's proposal is different but "no greater or lesser" than the local cable operator's obligations.[281] NATOA argues that this third option urged by Telephone Joint Petitioners would allow an open video system operator to be able to impose its own conception of equivalent support unilaterally and would not allow local communities to take a proactive role

[276]Alliance for Community Media, et al. Petition at 6; *see also* National League of Cities, et al. Petition at 14; City of Indianapolis Petition at 2 (unclear whether cable operators' obligations are to be doubled or halved); Cablevision Opposition at 8 (the Commission has cited no evidence supporting its conclusion that duplication of PEG facilities would be inefficient and not in the public interest); Michigan Cities, et al. Opposition at 12-13.

[277]National League of Cities, et al. Petition at 14; *see also* Alliance for Community Media, et al. Petition at 6 (a cable operator and an open video system operator cannot share an existing contractual commitment to the local franchising authority); Michigan Cities, et al. Opposition at 12 (the Commission cannot abrogate existing franchise agreements with respect to PEG access requirements by allowing the cable operator to reduce its contractual obligations).

[278]National League of Cities, et al. Petition at 14-15; *see* Michigan Cities, et al. Opposition at 12 (open video systems should increase the local PEG access availability to subscribers). *But see* NYNEX Opposition at 8.

[279]National League of Cities, et al. Petition at 15. *But see* NYNEX Opposition at 8.

[280]Telephone Joint Petitioners Petition at 13-14. *But see* NATOA Opposition at 7 (the LECs provide no support for their claim that local franchising authorities could or would attempt to extract other concessions); Michigan Cities, et al. Opposition at 12 (the Commission's approach provides no incentive for the open video system operator to negotiate with the local franchising authority).

[281]Telephone Joint Petitioners Petition at 14-15. *But see* Alliance for Community Media, et al. Opposition at 4-5 (opposing binding arbitration in the event of a stalemate).

in establishing open video system PEG access obligations.[282]

126. According to Comcast, because cable operators do not have a "default mechanism" of interconnection if their franchise negotiations with the local franchising authority fail, the open video system rules fail to ensure that the open video system's PEG access obligations are "no greater or lesser" than those of the cable operator.[283] Comcast also contends that neither the cable operator nor the open video system operator should be required to agree to a connection and cost sharing arrangement, and that, if an open video system operator and the cable operator do agree to connect their PEG access channel feeds and cost share, the open video system operator and the cable operator should be required to negotiate the terms and conditions of the sharing and connection.[284] NCTA claims that forced connection with the cable operator's channel feeds violates the 1996 Act's mandate to ensure that the open video system's PEG access obligations are "no greater or lesser" than those of the cable operator.[285] NCTA also asserts that requiring such connection is inconsistent with the statutory proscription against regulating cable systems as common carriers.[286]

127. In their opposition, Telephone Joint Petitioners also ask the Commission to eliminate the requirement for open video systems to share in the costs of facilities or equipment for PEG access, claiming that open video systems are required to provide only channel capacity for PEG access.[287] They claim that a local franchising authority's power to require cable operators to provide PEG-related services, facilities and equipment is derived from Section 621,

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[282]NATOA Opposition at 6.

[283]Comcast Petition at 8. *But see* Telephone Joint Petitioners Opposition at 9; NYNEX Opposition at 7 (the Commission's decision recognizes that open video system operators are not required to negotiate franchises but are required to provide PEG access, and that it is not efficient to require that a burden be suffered twice where it can be satisfied once).

[284]Comcast Petition at 11-12; *see also* NCTA Petition at 16 (absent a voluntary agreement with a cable operator to share PEG facilities, an open video system operator must meet its PEG access obligations independently).

[285]NCTA Petition at 16; *see also* Cablevision Opposition at 5-8 (connection and cost sharing impose more costs and burdens on the cable operator than on the open video system operator and therefore contravene the 1996 Act and unfairly benefit open video system operators); Michigan Cities, et al. Opposition at 12, 13 (simply connecting and sharing costs are not satisfying the same PEG access requirements). *But see* MFS Communications Opposition at 6 (cost sharing will result in apportioning the burdens on both open video system and cable operators and will be more efficient than requiring duplicate facilities).

[286]NCTA Petition at 16; *see also* Cablevision Comments at 4. *But see* Telephone Joint Petitioners Opposition at 7-8; NYNEX Opposition at n.18 (the Commission's approach does not burden cable companies as "PEG utilities," but instead reduces their contractual franchise burden through cost sharing); USTA Opposition at 11-12 (stating that the Commission's rule is entirely within Congress' directive to speed the introduction of competition for the cable incumbents, and that to require separate PEG facilities would be inefficient and burdensome).

[287]Telephone Joint Petitioners Opposition at 8-9.

not Section 611, and therefore cannot be extended to open video systems.[288]

128. In addition, Municipal Services, et al. request that the Commission clarify that existing LECs seeking to provide open video system service may be required in their telecommunications franchise to provide PEG access.[289] City of Indianapolis asserts that by not allowing local franchising authorities to require specific channel alignment for PEG access channels, the Commission has given open video system operators the ability to realign PEG access channels on a whim and presents identity and logistical problems for many access channels, especially those that are known simply by channel number.[290]

(2) Discussion

129. We continue to believe that open video system operators should in the first instance be permitted to negotiate their PEG access obligations with the relevant local franchising authority and, if the parties so desire, the local cable operator. Furthermore, we continue to believe that it is necessary to have a default mechanism in case the open video system operator and the local franchising authority are unable to agree. We disagree with Comcast that open video system operators should be required to negotiate with local franchising authorities.[291] Providing a "backstop" is an appropriate balance between imposing Section 611's requirements and not imposing franchise requirements on open video systems. If the open video system operator matches the PEG access obligations of the cable operator, the actual PEG access obligations imposed on the open video system operator will be, as the statute requires, to the extent possible no greater or lesser than those imposed on the cable operator. This is true even if the open video system operator's obligations are established through our default mechanism and the cable operator's obligations are established through negotiation and the franchise process.

130. After considering the arguments made by the various petitioners, we believe, however, that some modification of our rule regarding how to establish open video system PEG access obligations is appropriate. We believe that imposing Section 611 obligations on open video system operators so that to the extent possible the obligations are "no greater or lesser" than those imposed on cable operators means that, in the absence of an agreement with the local franchising authority, an open video system operator must match, rather than share, the annual PEG access financial contributions of the local cable operator. Under our current rule, open

[288] *Id.*

[289] Municipal Services, et al. Petition at 5-7; *see also* Telephone Joint Petitioners Opposition at 7 (whether existing rights-of-way agreements cover open video systems is a matter between the LEC and the local government or private property owner).

[290] City of Indianapolis Petition at 3-4.

[291] *See* Telephone Joint Petitioners Opposition at 9-10 (it is the 1996 Act not the Commission's default mechanism that relieves open video system operators of the requirement to negotiate with local franchising authorities).

video system operators are required to match the PEG access channel capacity provided by the local cable operator, but are required to share the contributions towards PEG access services, facilities and equipment. Our modified rule will apply the matching principle which we have applied to channel capacity also to PEG contributions that cable operators make, and that are actually used for PEG access services, facilities and equipment. For instance, if a cable operator makes an annual contribution of $15,000 that is used to purchase PEG access equipment, the open video system operator will now be required to do likewise.

131. For in-kind contributions (e.g., cameras, production studios), we believe that precise duplication would often be unnecessary, wasteful and inappropriate. Instead, open video system operators may work out mutually agreeable terms with cable operators over in-kind equipment, studios and the like so that PEG service to the community is improved or increased and the open video system operator fulfills its statutory obligation. As a backstop, however, we will permit the open video system operator to pay the local franchising authority the monetary equivalent of the depreciated in-kind contribution, or in the case of facilities, the annual amortization value. Any matching PEG access contributions provided by an open video system operator are to be used by the local franchising authority to fund activities arising under Section 611. We believe that information on the cable operator's PEG access contributions should be available to the local franchising authority, since a cable operator's monetary costs of complying with franchising requirements, including PEG access requirements, are identified as "external costs" under our cable rate rules.[292]

132. We decline to modify our rule that requires the local cable operator to permit the open video system operator to connect with the cable operator's PEG access channel feed.[293] We clarify, however, that any costs associated with the open video system operator's connection to the cable operator's PEG access channel feed shall be borne by the open video system operator. These costs shall be counted towards the open video system operator's matching obligation described above. Contrary to NCTA's assertion, we do not believe that this connection requirement impermissibly treats cable operators as common carriers. The connection requirement here is far different from a common carrier interconnection requirement.[294] We are not requiring the local cable operator to permit others to interconnect with and use their cable system to reach consumers.[295] Rather, we are simply requiring the local cable operator to provide

[292]*See* 47 C.F.R § 76.922(c)(3)(iv)(C).

[293]The connection requirement we affirm herein is not intended to affect any copyright protections applicable to PEG access channel feeds.

[294]*See, e.g.,* Communications Act § 251(c)(2), 47 U.S.C. § 251(c)(2).

[295]*See Southwestern Bell Telephone Co. v. FCC*, 19 F.3d 1475, 1480 (D.C. Cir. 1994), *citing National Ass'n of Reg. Utility Commissioners*, 533 F.2d 601, 608-09 (D.C. Cir. 1976) (two characteristics of a "common carrier" are that the entity: (1) deals indifferently with the public; and (2) provides a system on which customers transmit intelligence of their own design and choosing).

its PEG access channel feed to a particular competitor that shares a similar PEG access obligation in order to avoid an unnecessary duplication of facilities and promote Congress' goal of competitive entry.

133. We do not agree with Telephone Joint Petitioners that the open video system operator should be allowed to decide unilaterally how to satisfy its PEG access obligations, subject to a complaint before the Commission or arbitration. This approach would be inefficient and would increase the burdens on the local franchising authority, as well as the Commission.[296] Telephone Joint Petitioners' approach does not allow the local communities, which we recognized in the *Second Report and Order* are often in the best position to determine the needs and interests of the local community,[297] to participate effectively in establishing open video system PEG access obligations.[298] We believe that the Telephone Joint Petitioners' argument that the adopted approach will reduce a local franchising authority's incentive to negotiate is misplaced. Our approach should not be used to coerce local franchising authorities into agreeing to less than what Section 653(c)(2)(A) provides, specifically ". . . obligations that are no greater or lesser" than the obligations imposed on cable operators. In addition, as NATOA states, the record in this proceeding does not contain any evidence that local franchising authorities will use their ability to negotiate open video system PEG access obligations to obtain other concessions.[299]

134. We also disagree with Telephone Joint Petitioners with respect to whether open video system operators are required under the statute to provide more than channel capacity for PEG access. Telephone Joint Petitioners argue that, because open video system operators are required only to provide channel capacity, and not programming or other services, cable operators and local franchising authorities must cooperate in providing access to existing PEG programming feeds. Telephone Joint Petitioners also claim that the Commission has erroneously included the provision of "services, facilities or equipment which relate to PEG use" as a PEG access requirement to be imposed on open video systems. As stated in the *Second Report and Order*, Section 611(c) permits a local franchising authority to enforce any requirement in a franchise regarding the provision or use of PEG channel capacity, including provisions for services, facilities or equipment which relate to PEG use of channel capacity.[300] This provision incorporates the requirement of providing PEG access services, facilities and equipment into Section 611 and therefore, as applied through Section 653(c), imposes a responsibility on open video system operators to contribute toward PEG access services, facilities and equipment to the

[296] *See* Alliance for Community Media, et al. Opposition at 4-5.

[297] *Second Report and Order* at para. 137.

[298] *See* NATOA Opposition at 6.

[299] *Id.* at 7.

[300] *Second Report and Order* at para. 142; Communications Act § 611(c), 47 U.S.C. § 531(c).

same extent as the local cable operator.[301] We therefore refuse to modify our rule as requested by Telephone Joint Petitioners.

135. In response to the request of Municipal Services, et al., we clarify that the negotiated PEG access obligations of an open video system operator may be enforced regardless of where and when the agreement is made.[302] Regarding City of Indianapolis's assertion that channel alignment should not be at the discretion of the open video system, we affirm our decision in the *Second Report and Order* that there is insufficient evidence to support mandating that PEG access channels be carried at the same channel location on the open video system operator as on the cable system.[303] City of Indianapolis has presented no new evidence or argument not presented to the Commission before.

b. Establishing Open Video System PEG Access Obligations Where No Local Cable Operator Exists

(1) Background

136. We stated in the *Second Report and Order* by way of example that if a cable system converts to an open video system, the operator will be required to maintain the previously existing terms of its PEG access obligations.[304] Alliance for Community Media, et al. assert that if a common carrier buys the facilities of a cable operator, and at the expiration of the franchise term converts the system into an open video system, the PEG access obligations at the time of the purchase should not necessarily be retained by the open video system operator. Alliance for Community Media, et al. contend that this would leave many communities without PEG access as only 16% of cable systems have PEG access obligations.[305] Alliance for Community Media, et al. suggest that the local franchising authority should be able to request PEG access obligations at the time the cable system converts to an open video system, and then once every ten years

[301]Telephone Joint Petitioners claim that the Commission misinterpreted the legislative history of the 1996 Act by relying on language in the Conference Report which explained language in H.R. 1555 which was not carried over to the 1996 Act as adopted. Telephone Joint Petitioners Opposition at 9. We note that our primary reliance was and is on the statute itself, and that, as described above, Section 611(c) together with Section 653(c) impose an obligation on open video system operators to contribute toward PEG services, facilities and equipment to the same extent as the local cable operator.

[302]*See also* Telephone Joint Petitioners Opposition at 7.

[303]*See Second Report and Order* at para 141 n.329.

[304]*Id.* at para. 151.

[305]We believe that many of these cable systems with PEG access obligations are located in large urban areas, and therefore that the percentage of cable subscribers nationwide that receive PEG access channels may be far higher than 16%.

thereafter.[306]

(2) Discussion

137. Our discussion in the *Second Report and Order* regarding the establishment of open video system PEG access obligations where no local cable operator exists was not intended to foreclose a local franchising authority from negotiating with the open video system operator. The discussion, which was premised on the idea that the local franchising authority and the open video system operator may in the first instance negotiate the operator's PEG access obligations, was intended to explain how to establish open video system PEG access obligations where no local cable operator exists and the local franchising authority and the open video system operator cannot agree.[307] The parties are therefore free to negotiate PEG access obligations as Alliance for Community, et al. request.[308] As stated in the *Second Report and Order*, however, if the open video system operator and the local franchising authority cannot agree, the operator must make a reasonable amount of channel capacity available for PEG use. In the *Second Report and Order*, we found that where a cable franchise previously existed, such as where a cable system is able to convert to an open video system, what constitutes a reasonable amount of channel capacity is to be governed by the previously existing franchise agreement with respect to PEG access obligations.[309] This approach was formulated to comply with the statutory requirement that to the extent possible the PEG access obligations of open video system operators are to be no greater or lesser than those imposed on cable operators.[310]

138. While we do not believe that Congress intended open video system PEG access obligations to correct deficiencies in what the local franchising authority negotiated for cable operator PEG access obligations, we also recognize the concern that PEG access requirements should not be frozen in time in perpetuity. We will therefore modify our approach for a situation in which there was a previously existing cable franchise, such as where a cable system converts to an open video system, and provide that, when the open video system operator and the local franchising authority cannot agree on PEG access obligations, the local franchising authority may either keep the previously existing PEG access obligations or may elect to have the open video system operator's PEG access obligations determined by comparison to the franchise agreement

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[306]Alliance for Community Media, et al. Petition at 8-9; *see also* Michigan Cities, et al. Opposition at 12-13.

[307]*See Second Report and Order* at para. 151 ("Where there is no local cable operator and the open video system operator and the local franchising authority cannot agree on appropriate PEG access obligations, . . .").

[308]As stated above, Alliance for Community Media, et al. propose that the local franchising authority be permitted to request PEG access obligations once every ten years. The local franchising authority and the open video system operator are free to negotiate as often as the wish. We conclude that, if the parties cannot agree, however, the open video system operator's PEG access obligations should be re-established every 15 years, as discussed below.

[309]*Second Report and Order* at para. 151.

[310]*See* Communications Act § 653(c), 47 U.S.C. § 573(c).

for the nearest operating cable system that has a commitment to provide PEG access and that serves a franchise area with a similar population size. The local franchising authority shall be permitted to make a similar election every 15 years thereafter. We believe the PEG access obligations should be revisited every 15 years (unless the parties otherwise agree) because this is a common term length of a franchise agreement.[311] This approach will allow PEG access obligations to change over time with the needs and interests of the communities, rather than being frozen in perpetuity simply because a cable system has been converted to an open video system. With this modification, we otherwise affirm our decision regarding open video system PEG access obligations where no local cable operator exists as contained in the *Second Report and Order*.

c. *Provision of PEG Access Channels to All Subscribers*

(1) Background

139. In the *Second Report and Order*, the Commission found that PEG access channels should be provided to all subscribers, but that open video system operators should have the flexibility to determine how all subscribers will receive access channels, i.e., whether to provide a basic programming tier similar to that provided by cable systems, or to require unaffiliated video programming providers to offer PEG access channels to their subscribers.[312] NCTA believes that to make implementation more certain and enforcement more likely the Commission should institute a national approach to the required delivery of must-carry and PEG channels to subscribers, rather than leaving the method of implementation to the open video system operator. According to NCTA, programmers and packagers should not be responsible for PEG and must-carry provision if subscribers purchase these channels from another source.[313] USTA states that the Commission correctly determined that the open video system operator should have discretion over the manner in which it would fulfill its PEG access obligations.[314]

(2) Discussion

140. We affirm our decision that PEG access channels should be provided to all subscribers, but that open video system operators should have the discretion to determine how best to accomplish this. As stated in the *Second Report and Order*, this flexibility will permit the operator to provide PEG access channels in an efficient manner while not diminishing the

[311] *See, e.g.*, National League of Cities, et al. Petition at Appendices 1-5 (four of the five franchise agreements attached to the Petition are for a term of 15 years; one is for a term of ten years).

[312] *Second Report and Order* at para. 153.

[313] NCTA Petition at 15.

[314] USTA Opposition at 11.

provision of the PEG access channels to the community.[315] NCTA provides no new arguments or evidence as to why we should change our decision. NCTA simply restates its position previously presented in its comments which the Commission rejected.

d. Open Video System PEG Obligations Where System Overlaps with More than One Franchise Area

(1) Background

141. The *Second Report and Order* stated that open video system operators should be required to satisfy the PEG access obligations for all franchise areas with which their systems overlap.[316] Telephone Joint Petitioners assert that, from a technical standpoint, open video systems may be configured in a potentially significantly different manner than cable systems, and that the Commission therefore erred in relying on cable operators'. claims that it is possible to configure overlapping systems in order to meet multiple PEG access requirements.[317]

(2) Discussion

142. While we do not disagree with Telephone Joint Petitioners that open video systems may be configured differently from cable systems, as Alliance for Community Media, et al. point out, Telephone Joint Petitioners provide insufficient support for why open video systems will not be able to be configured to comply with the PEG access obligations for each franchise area with which each system overlaps.[318] In fact, Michigan Cities, et al. demonstrate that, in at least one situation, it is indeed possible.[319] We therefore deny Telephone Joint Petitioners' petition with respect to this matter.

e. Institutional Networks

(1) Background

143. With regard to institutional networks, we stated in the *Second Report and Order* that Section 611 does not specifically authorize local franchising authorities to require cable operators to build institutional networks, and that we would therefore not require open video

[315] *Second Report and Order* at para. 153.

[316] *Id.* at para. 154-155.

[317] Telephone Joint Petitioners Petition at 14-15. *But see* Alliance for Community Media, et al. Opposition at 5; NATOA Opposition at 7; Michigan Cities, et al. Opposition at 15-16.

[318] Alliance for Community Media, et al. Opposition at 5.

[319] Michigan Cities, et al. Opposition at 15-16.

system operators to build institutional networks. We also provided that if an open video system operator does build an institutional network, the local franchising authority may require that educational and governmental access channels be designated on that network to the extent such channels are designated on the institutional network of the local cable operator.[320] Alliance for Community Media, et al. state that, under Section 653(c)(2)(B), an open video system operator must provide institutional networks if a cable operator is required to provide institutional networks. If such a requirement is not imposed on open video system operators, according to Alliance for Community Media, et al., the open video system operator is not contributing towards PEG access obligations to the same extent as the cable operator.[321] Alliance for Community Media, et al. believe it is "an incongruous reading of Section 611 that a franchising authority could require that an OVS operator require educational and governmental access on an institutional network without being able to require construction of the underlying network."[322] City of Indianapolis asks that we clarify what an institutional network is, apparently because "the Act forbids municipalities from asking for telecommunication services from cable operators as part of a franchise agreement, which is what the cable industry is claiming an I-NET is."[323]

144. Michigan Cities, et al. assert that local franchising authorities have the power under Section 611 to require cable operators to provide institutional networks, and that they should therefore be permitted to require them of open video system operators. According to Michigan Cities, et al., the Commission must defer to the local franchising authorities on the interpretation of Section 611.[324] Similarly, National League of Cities, et al. contend that institutional networks are entirely a creature of PEG, and that the open video system operator must therefore have exactly the same institutional network requirements as the cable operator.[325]

145. USTA supports our interpretation of Section 611. USTA asserts that the fact that cable operators are resisting efforts by local franchising authorities to require the building of institutional networks is not a viable basis to misconstrue Section 611, and that the requiring open video system operators to build institutional networks would serve as a disincentive for LECs

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[320]*Second Report and Order* at para. 143; *see also* Communications Act § 611, 47 U.S.C. § 531.

[321]Alliance for Community Media, et al. Petition at 7; *see also* Michigan Cities, et al. Petition at 19 (the "no greater or lesser" requirement is not met unless institutional network requirements are met on a franchise area by franchise area basis).

[322]Alliance for Community Media, et al. Petition at 7; *see also* Michigan Cities, et al. Petition at 14; National League of Cities, et al. Petition at 16.

[323]City of Indianapolis Petition at 2; *see also* Communications Act § 621(b)(3)(D), 47 U.S.C. § 541(b)(3)(D).

[324]Michigan Cities, et al. Petition at 13-14.

[325]National League of Cities, et al. Petition at 16. *But see* Telephone Joint Petitioners Opposition at 4-5.

to enter the video marketplace through open video systems.[326]

(2) Discussion

146. We affirm our decision to preclude local franchising authorities from requiring open video system operators to build institutional networks[327] because the cable operator is required to do so under the terms of its franchise agreement. Because there is confusion over our interpretation of Section 611 as it applies to institutional networks, however, we make the following clarifications. Contrary to the understanding of certain petitioners,[328] we agree that institutional networks may be required of a cable operator, but we do not agree that this requirement is found in Section 611.[329] As stated in the *Second Report and Order*, Section 611 only provides that a local franchising authority may require that channel capacity on institutional networks be designated for educational or governmental use and does not authorize local franchising authorities to require cable operators to build institutional networks.[330] The building of an institutional network is a requirement negotiated in the franchise agreement.[331] Section 621(b)(3)(D), as added by the 1996 Act, makes clear that a local franchising authority may require a cable operator to provide institutional networks as a condition of the initial grant,

[326]USTA Opposition at 10-11.

[327]As stated above, City of Indianapolis requests that we clarify what an institutional network is. As stated in the *Second Report and Order*, institutional networks are defined in Section 611. *Second Report and Order* at n.334. Section 611(f) defines an institutional network as a communications network which is constructed or operated by the cable operator and which is generally available only to subscribers who are not residential subscribers. Communications Act § 611(f), 47 U.S.C. § 531(f). We decline to define institutional networks other than as the statute states. See, however, Michigan Cities, et al. Petition at 10-13 describing examples of the functions of institutional networks. As stated above, City of Indianapolis expresses concern over the definition of institutional networks apparently because the 1996 Act forbids municipalities from asking for telecommunication services from cable operators as part of a franchise agreement, "which is what the cable industry is claiming an I-NET is." City of Indianapolis Petition at 2. We note that Section 621(b)(3)(D), which contains the prohibition to which City of Indianapolis appears to be referring, specifically excludes institutional networks. *See* Communications Act § 621(b)(3)(D), 47 U.S.C. § 541(b)(3)(D). Although institutional networks may be telecommunications services, local franchising authorities are not restricted from requiring them.

[328]*See, e.g.,* Michigan Cities, et al. Petition at 14 and Opposition at 13-14.

[329]*See* Telephone Joint Petitioners Opposition at 3-4 (the issue is not whether local franchising authorities may require institutional networks, but whether that right is derived from Section 611).

[330]*Second Report and Order* at para. 143. We note that Michigan Cities, et al. misquotes Section 611 as providing that local franchising authorities may require "channel capacity for institutional networks." *See* Michigan Cities, et al. Petition at 15. Furthermore, contrary to the claim of Michigan Cities, et al., the Commission does not have to defer to local franchising authorities in interpreting Section 611, a federal statute.

[331]*See, e.g.,* Michigan Cities, et al. Petition at 15-16.

renewal or transfer of a franchise.[332] Pursuant to Section 653(c)(1)(C), open video system operators are not subject to franchise requirements, so we cannot apply an institutional network requirement to open video systems.[333]

147. While institutional networks may or may not function like PEG access as National League of Cities, et al. assert, the statutory definition is broader than merely PEG use. We do not agree that precluding the local franchising authority from requiring an open video system operator to build an institutional network, but permitting the local franchising authority to require channel capacity on a network if an open video system operator does build one, is inconsistent, as Michigan Cities, et al. suggest.[334] Rather, once an open video system operator decides to build an institutional network, the 1996 Act's mandate that an open video system operator's PEG access obligations be no greater or lesser than those of the cable operator become operative. We thus deny the petitions for reconsideration with respect to this matter.

2. Must-Carry and Retransmission Consent

a. Background

148. In the *Second Report and Order*, the Commission promulgated rules pursuant to Section 653(c)(1) that apply the provisions of Sections 325, 614, and 615 to open video system operators certified by the Commission.[335] In applying these provisions to open video system operators, we attempted to impose obligations that were, to the extent possible, "no greater or lesser" than the obligations imposed on cable operators.[336]

149. Sections 614 and 615 set forth a cable operator's "must-carry" obligations regarding local commercial and local noncommercial educational television signals, respectively.[337] They require that cable operators set aside a portion of their capacity for carriage of qualified local broadcast stations. Section 325 sets forth a cable operator's retransmission

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[332]Communications Act § 621(b)(3)(D), 47 U.S.C. § 541(b)(3)(D). *See also* Telephone Joint Petitioners Opposition at 5 (the separate references to Section 611 and institutional networks contained in Section 621(b)(3)(D) indicate that Congress understood that Section 611 is not the source of any right that franchising authorities may have to require cable operators to provide institutional networks). We also note that National League of Cities, et al. are therefore wrong when they state that the only mention in the Cable Act of institutional networks is in Section 611. *See* National League of Cities, et al. Petition at 16.

[333]*See* Telephone Joint Petitioners Opposition at 4-5.

[334]*See* Michigan Cities, et al. Petition at 14.

[335]*See Second Report and Order* at paras. 157-70; Communications Act § 653(c)(1), 47 U.S.C. § 573(c)(1).

[336]*See* Communications Act § 653(c)(2)(A), 47 U.S.C. § 573(c)(2)(A).

[337]Communications Act §§ 614, 615, 47 U.S.C. §§ 534, 535.

consent obligations, which generally prohibit cable operators and other multichannel video programming distributors from carrying a commercial broadcast station without obtaining the station's consent.[338] Local commercial stations seeking carriage must choose to proceed according to either the must-carry or retransmission consent requirements.[339] Stations choosing to proceed under must-carry are entitled to insist on carriage in their local market area.[340] Stations choosing to pursue carriage through retransmission consent must negotiate the terms of a carriage arrangement with a multichannel video programming distributor, and may receive compensation in return for carriage.[341] Non-local commercial stations may also be carried by a cable system pursuant to a retransmission consent agreement because Section 325 applies to broadcast stations in general.[342]

150. In the *Second Report and Order*, the Commission found that our must-carry and retransmission consent rules should apply to open video systems in largely the same manner as they currently apply to cable systems.[343] We stated that the operator of an open video system must "ensure that every subscriber on the open video system receives all appropriate must-carry channels carried in accordance with our rules," and we provided open video system operators the flexibility to choose the most appropriate method of complying with this requirement.[344] In addition, as with cable systems that span multiple television markets, we gave open video system operators the option of providing must-carry broadcast stations to all of the subscribers on their systems or configuring their systems so that subscribers only receive the signals of eligible television broadcast stations in their local market.[345] The Commission also found that with respect to must-carry and retransmission consent elections, certain anomalies might result as a consequence of the potentially vast size of open video systems. We found that it was not necessary for broadcast stations to apply the same election to all cable and open video systems serving the same geographic area.[346]

151. In its petition for reconsideration, NCTA recommends that the Commission specify

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[338]Communications Act § 325, 47 U.S.C. § 325.

[339]Communications Act § 325(b)(3)(B), 47 U.S.C. § 325(b)(3)(B).

[340]Communications Act §§ 614(a), 615(a), 47 U.S.C. §§ 534(a), 535(a).

[341]Communications Act § 325, 47 U.S.C. § 325.

[342]*Id.*

[343]*See Second Report and Order* at paras. 160-61.

[344]*Id.* at para. 162.

[345]*Id.* at para. 166.

[346]*Id.* at para. 169.

exactly how an open video system operator must satisfy its obligation to provide must-carry signals to all subscribers.[347] NCTA argues that if the Commission imposed some mechanism akin to the cable "basic tier" requirement, implementation would be more certain and enforcement would be easier.[348] NCTA also urges the Commission to find that programmers are not responsible for providing must-carry signals to subscribers if subscribers purchase those signals from some other source.[349]

152. ALTV urges the Commission to prohibit an open video system's widespread carriage of local signals beyond a station's local market area.[350] First, ALTV argues that the rule allowing cable operators to "narrowcast" the must-carry signals to the particular areas or to deliver signals throughout a system should not be applied to open video systems.[351] ALTV argues that unlike the cable systems that were already established when the must-carry rules were adopted, open video systems are still being designed and can be built to distribute must-carry signals to specific local markets.[352] ALTV also argues that stations will not be able to use retransmission consent outside of their local markets if open video systems carry these stations beyond their local markets pursuant to the must-carry rules.[353] Finally, ALTV argues that stations may encounter prohibitive copyright fees if open video systems are eventually subject to the cable compulsory license.[354] It argues that on very large open video systems that are not configured to limit distribution of must-carry signals to the station's local market, the copyright fees will be prohibitively high, since the open video system operator will be allowed to recover from the station all such fees incurred as a result of carriage beyond the station's local market area.[355]

153. In response, NYNEX argues that the Commission should avoid creating "stringent regulatory solutions" for problems characterized by NYNEX as "speculative."[356] NYNEX also suggests that the issues raised by ALTV may be irrelevant because open video systems have not yet been developed and may be able to "carry programming to households on a selective,

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[347]NCTA Petition at 15.

[348]*Id.*

[349]*Id.*

[350]ALTV Petition at 1.

[351]The term "narrowcast," as used in this section, means the transmission of a signal to a limited geographic area.

[352]ALTV Petition at 1.

[353]*Id.*

[354]*Id.* at 3.

[355]*Id.* at 1-3.

[356]NYNEX Opposition at 9.

'addressable' basis."[357]

154. Tele-TV recommends that the Commission reconsider its decision not to require broadcasters to make the same election among open video systems and cable systems serving the same geographic area.[358] Tele-TV argues that the Commission's decision is inconsistent with its finding that the technical and size differences between open video systems and large cable systems are insufficient to warrant application of significantly different must-carry and retransmission consent rules.[359] Tele-TV submits that if broadcasters are allowed to make different elections, they may discriminate between open video systems and cable systems in areas serving the same subscribers.[360] It states that such a rule could result in unfair situations, such as open video systems being forced to pay for competitively valuable signals that are provided to cable systems for free.[361] Tele-TV asserts that the Commission need not assume that large open video systems will be unable to provide signals to specific parts of their systems pursuant to either must-carry or retransmission consent.[362] It argues that the Commission's current rule should apply until an open video system operator is able to certify to broadcasters that made different elections in different franchise areas that its system is capable of operating in conformity with those elections.[363] U S West supports Tele-TV's proposal.[364]

155. ALTV opposes Tele-TV's recommendation that the Commission reconsider its decision to permit broadcasters to make different must-carry and retransmission consent elections for open video systems and cable systems serving the same geographic area. ALTV argues that Tele-TV has failed to show that the Commission's findings in the *Second Report and Order* were inconsistent or unreasonable.[365] It further argues that it is speculative for Tele-TV to suggest that open video systems may be able to implement different must-carry/retransmission consent elections in different areas served by their systems.[366]

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[357]*Id. See also* Joint Telephone Petitioners Opposition at 14-15 (arguing that network efficiencies will drive open video system configurations rather than attempts to game the must-carry/retransmission consent rules).

[358]Tele-TV Petition at 8-13.

[359]*Id.* at 8-9.

[360]*Id.* at 9-10.

[361]*Id.*

[362]*Id.* at 12.

[363]*Id.* at 13.

[364]U S West Opposition at 6-7.

[365]ALTV Opposition at 2-3.

[366]*Id.* at 3.

b. Discussion

156. In the *Second Report and Order*, the Commission considered and rejected suggestions similar to NCTA's that we specifically require the use of a basic tier-type arrangement in order to provide all subscribers on a system with the signals carried in fulfillment of the must-carry requirements.[367] As we noted in the *Second Report and Order*, the basic tier requirement is contained in Section 623 of the Communications Act, which does not apply to open video systems.[368] NCTA has presented no new evidence in support of a basic tier requirement. We therefore decline to adopt NCTA's request. We agree with NCTA, however, that video programming providers should not be required to duplicate must-carry programming already provided to subscribers from another source.

157. The Commission recognizes ALTV's valid concern that stations electing must-carry status will have to reimburse open video system operators for extensive copyright fees that may result from carriage beyond their local market areas.[369] As ALTV notes, these dangers may be avoided if open video system operators tailor the distribution of must-carry signals to the parts of their system that are located within a station's local market.[370] We believe that our rules provide open video system operators with an incentive to design and construct their systems with this capability. Where an open video system has such a capability, we will require open video system operators to limit the distribution of must-carry signals to the appropriate local markets, unless a local broadcast station consents otherwise. If an open video system operator cannot limit its distribution of must-carry signals in this manner, the open video system operator will be responsible for any increase in copyright fees and may not pass through such increases to the local station electing must-carry treatment.[371]

158. Finally, we agree with Tele-TV and U S West that we should amend our current rule that allows broadcasters to make different elections among open video systems and cable systems serving the same geographic area.[372] The "common election" requirement is contained in Section 325(b)(3)(B): "If there is more than one cable system which services the same geographic area, a station's election shall apply to all such cable systems."[373] In Section 653(c),

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[367] *Second Report and Order* at para. 163.

[368] *Id.*

[369] ALTV Petition at 3.

[370] *Id.* at 4.

[371] The Commission does not here intend to prejudge the issue of the applicability of the cable compulsory license to open video systems.

[372] Tele-TV Petition at 12-13; U S West Opposition at 6-7.

[373] *See* Communications Act § 325(b)(3)(B), 47 U.S.C. § 325(b)(3)(B)

Congress provided that Section 325 should apply to open video system operators, to the extent possible, no greater or lesser than it applies to cable operators.[374] By directing equal treatment under Section 325, we believe that Congress intended to remove Section 325 as a distinguishing factor between those entering the video marketplace as a cable operator and those entering as an open video operator. Thus, since LECs and other entities entering the video marketplace as overbuilding cable operators would be entitled to rely upon Section 325's common election requirement, we believe that overbuilding open video system operators should be entitled to do the same. To hold otherwise would tip the balance in favor of the traditional cable option in a manner that Congress did not intend.

159. In the *Second Report and Order*, however, we found that as a practical matter the potential size differences between open video systems and cable systems could make common election on overlapping cable and open video systems infeasible.[375] We agree with Tele-TV that our concern in the *Second Report and Order* may no longer apply to the extent that an open video system can tailor the distribution of local broadcast stations to the appropriate communities.[376] As noted above, we believe that our rules provide open video system operators with an incentive to construct their systems with this "narrowcast" capability.[377] We will therefore amend our rules to require that broadcasters make the same election for open video systems and cable systems serving the same geographic area unless the overlapping open video system is unable to deliver appropriate signals in conformance with the broadcast station's elections for all cable systems serving the same geographic area.

3. Program Access

a. Background

160. In the *Second Report and Order*, we concluded that, pursuant to Section 653(c)(1)(A), the program access restrictions should apply to the conduct of open video system operators in the same manner as they are currently applied to cable operators and common carriers or their affiliates that provide video programming directly to subscribers.[378] We concluded that it was most appropriate to apply Section 628 to open video system operators by creating parallel provisions for cable operators and open video system operators, such that, for example, open video system operators are prohibited from entering into exclusive agreements with satellite programming vendors in which an open video system operator has an attributable interest,

[374]Communications Act § 653(c), 47 U.S.C. § 573(c).

[375]ALTV supports the rule we adopted in light of this potential difficulty. ALTV Opposition at 2-3.

[376]Tele-TV Petition at 12.

[377]*See supra* at Section III.F.2.b.

[378]*Second Report and Order* at para. 175.

but are permitted to enter into an exclusive agreement with a satellite programming vendor in which a cable operator has an attributable interest.[379] We also stated that, in order to effectuate the purposes of the program access statute in the open video system context, open video system programming providers should be subject to the program access provisions. Specifically, we concluded that we would extend our program access rules to prohibit cable-affiliated satellite programmers and cable-affiliated open video system programming providers from entering into exclusive programming agreements, unless the Commission first determines that the exclusive arrangement is in the public interest under the factors listed in Section 628(c)(4).[380] Finally, we found that open video system programming providers that provide more than one channel of programming clearly fit within the definition of an MVPD and that they are therefore entitled to the benefits of the program access provisions.[381]

161. NCTA and Rainbow ask the Commission to reconsider its decision to apply the program access rules to video programming providers on an open video system.[382] They argue that the Commission impermissibly extended the exclusivity provisions of Section 628 to open video system video programming providers, contrary to the plain language of Section 653(c)(1)(C), which extends the program access rules solely to open video system operators.[383]

162. Rainbow also argues that the Commission's interpretation of the 1996 Act contravenes the policy underlying open video systems.[384] Rainbow states that by giving competing video programming providers the right to access each other's programming, the Commission has undermined the competition and diversity open video systems were intended to promote.[385] Rainbow cautions that if the Commission expands the program access rules to open video system programming providers, Rainbow will be forced to provide its programming directly to its potential competitors and will have no incentive to use open video systems on its own.[386]

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[379] *Id.* at paras. 176-177, 179.

[380] *Id.* at paras. 186-194.

[381] *Id.* at paras. 195-196.

[382] NCTA Petition at 10; Rainbow Petition at 6. *See Second Report and Order* at para. 182.

[383] NCTA Petition at 10; Rainbow Petition at 6-9.

[384] Rainbow Petition at 10.

[385] *Id.* at 11; *see also* NCTA Petition at 11 (arguing that the effect of the Order's prohibition on certain exclusive arrangements between programmers and open video system video programming providers will reduce competition among such providers).

[386] *Id.* at 12. Conversely, in its opposition to petitions for reconsideration, RCN argues that under Rainbow's model "only OVS programming providers that are affiliated with satellite programmers (most of whom are also affiliated with cable operators) could survive." RCN at 8.

163. USTA and NYNEX support the Commission's decision to apply the program access rules to open video system video programming providers.[387] USTA argues that despite claims by cable incumbents, "parity of access is an essential pre-condition for LECs to provide meaningful competition to incumbent cable operators, due to the concentration of control over vast portions of . . . programming among a handful of vertically integrated cable operators."[388] RCN characterizes Rainbow and NCTA's arguments as "merely an attempt by cable affiliated entities to maintain their dominant market position despite the procompetitive policy of the 1996 Act."[389] RCN submits that the Commission's application of Section 628 to open video system programming providers is based on the 1992 Cable Act, and that the Commission had no need to rely on the extension of that provision in the 1996 Act.[390]

164. Rainbow further objects to the Commission's conclusion that open video system programmers qualify as multichannel video programming distributors ("MVPDs").[391] Rainbow argues that Congress declined to add open video system video programming providers to the list of representative entities under the definition of MVPDs in Title VI.[392] Rainbow asserts that this omission is significant, in that the listed MVPDs all operate the vehicle for distribution (e.g., cable, MMDS, DBS), whereas open video system video programming providers distribute their product on a common platform in direct competition with other programming providers.[393]

165. In opposition to Rainbow's argument that programming providers are not MVPDs, MPAA, RCN, and Tele-TV argue that open video system programming providers are MVPDs, based on the illustrative, not exhaustive, list of MVPDs set forth in Section 602(13).[394] MPAA, RCN and Tele-TV argue that open video system video programming providers clearly fit the definition of MVPD because they "make available for purchase, by subscribers or customers, multiple channels of programming."[395]

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[387]USTA Opposition at 6; NYNEX Opposition at 15-16.

[388]Rainbow Petition at 7.

[389]RCN Opposition at 3-4.

[390]*Id.* at 4.

[391]Rainbow Petition at 17.

[392]*Id.* at 18.

[393]*Id.*

[394]MPAA Comments at 3; RCN Opposition at 9-10; Tele-TV Opposition at 1-2.

[395]Communications Act § 602(13), 47 U.S.C. § 522(13). *See* MPAA Comments at 3; RCN Opposition at 9-10; Tele-TV Opposition at 1-2.

166. NCTA contends that the Commission erred in applying the exclusivity provisions of Section 628 to contracts between cable-affiliated satellite programmers and cable-affiliated open video systems video programming providers.[396] NCTA contends that the exclusivity prohibitions in Sections 628(c)(2)(C) and (D) apply only to exclusive contracts between cable operators and cable-affiliated satellite programmers.[397] NCTA points out that Sections 628(c)(2)(C) and (D) do not say "cable operator *or its affiliate*."[398] Nor, according to NCTA, is the Commission authorized to reach such exclusive arrangements under Section 628(b), since 628(b) is limited by its plain language to unfair or deceptive acts or practices of a cable operator, not a cable-affiliated open video system programming provider.[399]

167. Finally, NCTA argues that the *Second Report and Order* impermissibly precludes individual vertically integrated satellite programmers from marketing directly to open video system subscribers unless they accept a "duty to deal" with open video system video programming providers on the system.[400] NCTA submits that there is nothing *per se* unreasonable or anticompetitive about a supplier choosing to retail directly to customers.[401] In any event, NCTA submits that the Commission cannot artificially create and discriminate against a subclass of the open video system technology (i.e., open video system programming providers).[402]

b. Discussion

168. We believe that our initial interpretation applying the provisions of Section 628 to open video system programming providers is reasonable and should stand. First, Rainbow and NCTA's argument that Congress limited the applicability of the program access rules to open video system operators was expressly considered and rejected in the *Second Report and Order.*[403] Nevertheless, we will take this opportunity to reiterate the basis for our decision. We reject NCTA's challenge to our authority to apply the exclusivity provisions of Section 628(c)(2)(C) and (D) to the exclusive arrangements between satellite programmers in which a cable operator has an attributable interest and open video system programming providers in which a cable operator has an attributable interest. The structure of Section 628 confers broad authority on the

[396]NCTA Petition at 11.

[397]Rainbow Petition at 11.

[398]NCTA Petition at 12 (emphasis in original).

[399]*Id.*

[400]*Id.* at 13.

[401]*Id.*

[402]*Id.* at 14.

[403]*See Second Report and Order* at paras. 182, 186.

Commission to adopt regulations in order to promote "the public interest . . . by increasing competition and diversity in the multichannel video programming market and the continuing development of communications technology."[404] Congress required that such regulations specify particular conduct prohibited by Section 628(b), which makes it:

> unlawful for a cable operator, a satellite cable programming vendor in which a cable operator has an attributable interest, or a satellite broadcast programming vendor to engage in unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or to prevent any [MVPD] from providing satellite cable programming or satellite broadcast programming to subscribers or consumers.[405]

Therefore, we reject NCTA's argument that Section 628(b) and our implementing regulations only apply to the conduct of cable operators. Our regulations clearly can extend to the conduct of cable-affiliated satellite programmers, including, of particular relevance here, the manner in which such programmers deal with open video system programming providers.

169. Moreover, as we stated in the *Second Report and Order*, Section 628(b) authorizes the Commission to adopt additional rules to accomplish the program access statutory objectives "should additional types of conduct emerge as barriers to competition and obstacles to the broader distribution of satellite cable and broadcast programming."[406] The Commission has called Section 628(b) a "clear repository of Commission jurisdiction" to address those obstacles.[407] By entitling Section 628(c) "Minimum Contents of Regulations," Congress gave the Commission authority to adopt additional rules that will advance the purposes of Section 628; it did not limit the Commission to adopting rules only as set forth in that statutory provision.[408]

170. As we stated in the *Second Report and Order*, an exclusive contract between a cable-affiliated video programming provider on an open video system and a cable-affiliated programmer presents many of the same concerns as an exclusive contract between a cable operator and a vertically integrated satellite programming vendor. A primary objective of the

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[404]Communications Act § 628(c)(1), 47 U.S.C. § 548(c)(1).

[405]Communications Act § 628(b), 47 U.S.C. § 548(b).

[406]*See Second Report and Order* at para. 186; *First Report and Order* in MM Docket No. 92-265 *("First Report and Order")*, 8 FCC Rcd 3359, 3374; *Implementation of Cable Television Consumer Protection and Competition Act of 1992: Development of Competition and Diversity in Video Programming Distribution and Carriage, Memorandum Opinion and Order on Reconsideration of the First Report and Order* in MM Docket No. 92-265 (*"DBS Order"*), 10 FCC Rcd 3105, 3126-3127 (1994).

[407]*First Report and Order*, 8 FCC Rcd at 3374.

[408]*See* RCN Opposition at 6 (discussing the Commission's broad mandate to adopt additional regulations that it finds necessary to effectuate the purpose of Section 628(b)).

program access requirements is the release of programming to existing or potential competitors of traditional cable systems so that the public may benefit from the development of competitive distributors.[409] Exclusive arrangements among cable-affiliated open video system programming providers and cable-affiliated satellite programmers may impede the development of open video systems as a viable competitor to cable.[410] NCTA and Rainbow fail to challenge or address these concerns.

171. Second, we believe that the benefits of the program access provisions apply to open video system providers. Contrary to Rainbow's arguments, open video system programming providers fall within the definition of MVPDs, which Section 628 identified as the intended beneficiaries of the program access regime.[411] Specifically, in response to Rainbow's argument that Congress did not amend Section 602(13) to add open video system video programming providers to the list of MVPDs, we agree with MPAA, Residential Communications and Tele-TV that the list of entities enumerated in that section is expressly a non-exclusive list. Section 602(13) states that the term MVPD "means a person such as, *but not limited to,* a cable operator, a multichannel multipoint distribution service, a direct broadcast satellite service. . . . "[412] We also agree with those commenters that asserted that open video system video programming providers fit the definition of MVPD because they make "available for purchase, by subscribers or customers, multiple channels of video programming.[413] Furthermore, we find Rainbow's argument that video programming providers cannot qualify as MVPDs because they may not operate the vehicle for distribution to be unsupported by the plain language of Section 602(13), which imposes no such requirement.[414] The conclusion that open video system programming providers are MVPDs is further supported by the amendment to the effective competition "test' of Section 623(d) added by the 1996 Act.[415] That section explicitly refers to "a local exchange carrier or its affiliate (or any multichannel video programming distributor using the facilities of such carrier or its affiliate)."[416] In light of these factors, an open video system video

[409]*See Second Report and Order* at para. 188.

[410]*See id.* at paras. 189-191.

[411]*See, e.g.,* Communications Act § 628(b), 47 U.S.C. § 548(b) (prohibiting certain conduct which "hinder[s] significantly or [prevents] any multichannel video programming distributor from providing satellite cable programming or satellite broadcast programming to subscribers or consumers.")

[412]Communications Act § 602(13), 47 U.S.C. § 522(13) (emphasis added).

[413]*Id.*

[414]*See also* Tele-TV Opposition at 2 (the fact that most open video system programming providers will use another party's network has no relevance under Section 602(13)).

[415]Communications Act § 623(d), 47 U.S.C. § 543(d) (emphasis added).

[416]Communications Act § 623(l)(1)(D), 47 U.S.C. § 543(l)(1)(D).